FILE COPY

FILED
MAY 2 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 853

MICHAEL P. GRACE, II, individually and as a Trustee under the Last Will and Testament of JANET GRACE, *Petitioner,*

against

DEERDALE, INC., RYE PROPERTY OWNERS, INC., GRACE NATIONAL BANK OF NEW YORK, GRACE PROPERTIES INC., in Liquidation and ARNOLD JORGENSEN, COMMITTEE OF JANET MAUREEN GRACE, by Grace National Bank of New York and Michael P. Grace, II, its members, CHARLES McDONALD GRACE, individually and as a Trustee under the Last Will and Testament of JANET GRACE, deceased, JOSEPH P. GRACE, JR., individually and as a Trustee under the Last Will and Testament of JANET GRACE, deceased, and JOHN P. BOLAND, *Guardian ad Litem* for JANET MAUREEN GRACE, *Respondents.*

PETITIONER'S REPLY TO RESPONDENTS' BRIEFS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

GEORGE J. SCHAEFER, Esq.
Counsel for Petitioner
654 Madison Avenue
New York 21, New York

JOHN W. CRAGUN
1616 H Street, N. W.
Washington 6, D. C.
Of Counsel

PAUL, JOHNSON & ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 853

MICHAEL P. GRACE, II, individually and as a Trustee under the Last Will and Testament of JANET GRACE,
Petitioner,

against

DEEPDALE, INC., REAL PROPERTY OWNERS, INC., GRACE NATIONAL BANK OF NEW YORK, GRACE PROPERTIES INC., in Liquidation and ALBERT JORGENSEN, COMMITTEE OF JANET MAUREEN GRACE, by Grace National Bank of New York and Michael P. Grace, II, its members, CHARLES MACDONALD GRACE, individually and as a Trustee under the Last Will and Testament of JANET GRACE, deceased, JOSEPH P. GRACE, JR., individually and as a Trustee under the Last Will and Testament of JANET GRACE, deceased, and JOHN P. BOLAND, *Guardian ad Litem* for JANET MAUREEN GRACE, *Respondents.*

PETITIONER'S REPLY TO RESPONDENTS' BRIEFS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. Respondents Cannot Say That Petitioner's Dilemma Was His Own Fault

Respondent Committee's brief states (p. 2) that one of the questions presented is "when a plaintiff in a civil case has so abused his trial counsel as to cause

such counsel to decline further to confer with his client [etc.] . . . ." Evidently, Respondent Committee would have the Court believe that petitioner's trial counsel's pique was petitioner's fault. Perhaps it was; perhaps it was not; the record does not show. All the record shows is that petitioner's attorney was considerably upset about whatever transpired between him and petitioner, wanted to withdraw, and thought he should be allowed to withdraw. For all the record shows, the attorney may have taken undue umbrage at a legitimate though undiplomatic challenge of his strategy. See R. 675, where petitioner stated that the only difference between him and counsel was policy as to how to pursue the case. In fact, petitioner was even unaware that his attorney planned to withdraw until just before the trial resumed on October 15. R. 675. At any rate, the record is clear that petitioner immediately told the court that it "would be perfectly all right" if Mr. Haydon continued on as his attorney. R. 675. Mr. Haydon's insistence on withdrawing cannot be charged to petitioner in view of petitioner's willingness that he remain.

II. The Case Necessarily Turns on the Denial-of-Counsel Issue

It may be that on first glance, such as might be gathered from a summary application for extension of time, the case appears to present only a question of trial-court discretion in denying a continuance. Respondent Committee's brief (p. 6), and that of Respondents Joseph and Charles Grace (p. 2), so characterize the case. But what the facts actually show, as documented in our petition for certiorari, is that petitioner's counsel decided to withdraw, despite peti-

tioner's willingness that he remain; that the court would not permit him to withdraw; that he remained physically present only because of court order; that he did not in fact represent petitioner's cause and indeed would not even speak to him; and that the court refused petitioner a reasonable opportunity to engage counsel who would represent his cause. This as effectively denied petitioner his right to counsel as if the court itself had discharged petitioner's counsel and refused to allow new counsel to appear.

After directing Mr. Haydon to continue as petitioner's counsel, the court should have compelled Mr. Haydon to perform his duties, one of the most basic of which is the duty to confer with the client. This duty went unsatisfied. The court knew it and did nothing. From the moment the trial was resumed by Mr. Haydon under court order, petitioner was without effective counsel. He had warned the court he could not effectively represent petitioner. Despite the court's responsibility for the appointment, to its own knowledge the court permitted assigned counsel in the latter portion of the trial to sit passively and entitle himself to a fee by the mere passage of time. Respondents do not respond to this point in their briefs, but seek to draw a red herring across the path by characterizing the case as involving merely a question of adjournment, which is not the real issue.

Anyway, "discretion" is not a simple plea in bar. The fact that discretion on the part of the trial court exists does not mean that there are at least two ways in which it can be exercised without committing reversible error. This Court has reversed for abuse of discretion where admitted discretion was exercised in one of the only two ways open. *Langnes v. Green*, 282 U.S. 531, 541-542 (1931).

III. The Federal Question Was Adequately Preserved

Respondent Committee's brief states (p. 7) that no federal question was raised at trial, and makes much of the fact that petitioner did not cite chapter and verse of the Due Process Clause of the Fourteenth Amendment to the Federal Constitution. True, petitioner's protests were not couched in terms of the ordinary legal formula. This was because the court had deprived him of legal assistance. But what he was protesting about was as clear to the trial court as any lawyer could have made it, and the court showed it understood the exact nature of the protest by devoting almost a third of its opinion to the denial-of-counsel issue. Thus, the policy of the Federal statute to insure the trial court an opportunity to pass on claimed errors was fully satisfied. In any event, as soon as petitioner had a chance to engage counsel, and constantly thereafter, the technicalities of preserving the federal question were fully satisfied. Under the circumstances, petitioner could have done no more.

IV. The Case Is Not Moot

Respondent Committee's brief asserts the case is moot (p. 9) because petitioner failed to perfect his appeal as against the real party in interest. The notice of appeal was served at a time when petitioner was still without counsel, and so again the Federal Constitution forbids causing him to suffer for his ignorance of legal technicalities. In any event, if petitioner's contention that he was denied the right to counsel is upheld, the trial court's judgment was void, and the fact that two of the defendants might fortuitously have escaped from the case after such a void judgment is immaterial. The penalty on the play nullifies the touchdown. In *Roberts* v. *Anderson*, 66

F. 2d 874 (10th Cir. 1933), the party who had been denied counsel *did not even appeal;* yet in a later separate proceeding the first proceeding was voided because of the denial of counsel.

The claim of mootness was urged in the New York Court of Appeals, but that court did not dismiss on that ground. Real Property Owners and Deepdale were served as parties in the Court of Appeals, as with the petition herein, and hence are aware that the judgment dismissing them as parties is still subject to reversal, depending on the outcome of the denial-of-counsel issue in this Court.

V. Conclusion

The petition should be granted.

Respectfully submitted,

GEORGE J. SCHAEFER, ESQ.
Counsel for Petitioner

JOHN W. CRAGUN
Of Counsel